Supreme Court, U.S.
FILED

03 665 OCT 20 2003

OFFICE OF THE CLERK

Petition for Writ of Certiorari in Hawkins and Hobbs

No. 02-17137 and 02-17095

IN THE

Supreme Court of the United States

MAX E. HAWKINS AND RICHARD HOBBS, pro se,
Petitioners,
v.
DONALD E. EVANS, SECRETARY OF COMMERCE,
UNITED STATES DEPARTMENT OF COMMERCE

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MAX E. HAWKINS, 2930 El Camino Road, Las Vegas, NV 89146
(702) 252-3503
AND
RICHARD HOBBS, 2585 Pleasant View Place, Sparks, NV, 89434,
(775) 356-0905
Petitioners appearing pro se

---

51 pp

QUESTIONS

Question One: Did the U.S.District Court violate established legal rights of both Petitioners by wrongfully vacating an earlier joinder Order by ruling three egregious and clear manifest legal errors?

Question Two. Did the U.S.District Court violate Hawkins's established legal rights by ruling five egregious amd clear manifest legal errors in awarding the Defendant Summary Judgment?

Question Three. Did the reviewing Panel of the Circuit Court of Appeals for the Ninth Circuit not violate established rights of Petitioners Hobbs and Hawkins by improperly reviewing said District Court and supporting such Court when it ruled at least eight egregious and clear manifest errors of law?

TABLE OF CONTENTS

PAGE

Questions Presented for Review..... i
Table of Authorities..... iii
Petition for writ of certiorari..... 1
Opinions Below..... 1
Jurisdiction..... 2
Constitutional and Statutory Provisions Involved..... 3
Statement of the case..... 4
I. Factual Background..... 4
II. Proceedings below..... 5
A. The district court..... 6
B. The Court of Appeals..... 9

Reasons for granting the writ.....11
Conclusion.....12

APPENDIX

Contents of Appendix Page

Appendix A Cir.9 Panel Memorandum(9th Cir).....1
Appendix B Cir 9 Panel Denial Reconsideration.....3
Appendix C District Ct. ORDER Vacate Joinder.....3
Appendix D Denial Reconsideration.....9
Appendix E Dist.Ct.ORDER Dismissal.....10
Appendix F Original Complaint, Hawkins.....16
Appendix G Amended Complaint. Joined.....23
Appendix H Part III-Hawkins Mot.Sum.Judg.....29
Appendix I District Ct Reno ORDER.....34
Appendix J Cir 9 Panel Memo and Denial Reconsid.....36

TABLE OF AUTHORITIES

CASES: Page

Blue v. Widnall, 162 F.3d 541,542 (9th Cir.1998).....7

Brock v. U.S., 64 F3d 1421,1422 (9th Cir 1995).....6

EEOC v. Wilson Metal Casket Co. 24 F.3d 836 (6th Cir.1994..5

Mosley v. General Motors Corp. 497 F.2d 1330, 1333
(8th Cir. 1974).....4,10

Reeves v. Sanderson Plumbing Product, Inc.
120 S.Ct. 2097,2109 (2000).....2,6,7,8,9,10,11
App.G,p.23, App.H,p.29

PETITION FOR WRIT OF CERTIORARI

Petitioners, pro se, Hawkins and Hobbs respectfully petition this Court for a writ of certiorari to review a final judgment filed on July 25, 2003, by the United States Court of Appeals for the Ninth Circuit, Panel---RYMER, KLEINFELD, and FISHER, Circuit Judges--- sustaining Opinions rendered in the United States District Court for the Southern District of Nevada.

OPINIONS BELOW

The Appellate Court **MEMORANDUM** dismissing Petitioners Appeal by the U. S.Circuit Court of Appeals--Ninth Circuit Panel of Rymer, Klienfeld, and Fisher--Circuit Judges..Filed Apr.16,'03. Is reported in Appendix A pages 1 to 3.

The **Appellate Court ORDER denying rehearing** by same panel--Filed July 25, '03. Is reported in Appendix B page 3.

The ORDER of the U.S.District Court **ORDER vacating an earlier joining** the Petitioners, Entered and Served Sept. 4, '01, is reported in Appendix C pages 3 to 9.

The ORDER of the **District Court denying Reconsideration of vacating order** entered and served Oct. 18, '01, is reported in Appendix D at Pages 9.

The ORDER of the District Court granting **Summary Judgment to Defendant** Entered and Served July 10, '02 is reported in Appendix E at page10.

The ORDER **dismissing Reconsideration of Summary Judgment** entered and served Aug. 19, '02 is reported in Appendix at pages

RELATING TO HOBBS ONLY:

After District Ct. In Las Vegas vacated Joiner ORDER, Hobbs filed a Complaint in U.S.District Court/Reno. The ORDER of **Dismissal** entered and served Jul. 10, '02 is reported in Appendix J at pages 134 to 136.

Reconsideration was denied on September 11 '02. Without comment.

The 9th Cir.Ct of Appeals heard Hobbs' cause on Transcript and affirmed the Dismissal on May 5, '03. A Panel of SKOPIL, FERGUSON, and BOOCHEVER, Circuit Judges denied Hobbs' petition for rehearing without comment filed April 23, '03

NOTE: These actions of the U.S.District Court and the Ninth Circuit Court of Appeals considered only the timeliness of Hobbs's administrative remedy and Joinder with Petitioner Hawkins in the U.S.District Court, Las Vegas. Judgment didn't go to the merits of Hobbs's case and the Reno actions add no new issues for this Court's consideration.

PETITION FOR WRIT OF CERTIORARI

JURISDICTION

A 9th Circuit Court of Appeals Panel entered its judgment April 16,2003, Petitioners filed a timely petition for rehearing which was denied and filed July 25, 2003, sustaining two Orders of the U.S.District Court for the Division of Nevada. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Petitioners also request this Court to exercise it's supervisory powers of Rule 10(a) of this Court to review the panel decision (Appendix page1) of the United States Court of Appeals for the Ninth Circuit, namely RYMER, KLEINFELD, and FISHER, Circuit Judges who have so departed from the accepted and usual course of judicial proceedings, and have sanctioned such a departure by the U.S.District Court, for the Division of Nevada, District Judge KENT DAWSON, Presiding, as to call for an exercise of this Court's supervisory powers.

Jurisdiction of this Court is also invoked under Rule 10c of this Court regarding the same Appellate Panel and same District Judge named in the preceding paragraph have decided important federal questions concerning rights of Federal employees claiming discrimination under Title VII of the Civil Rights Act of 1964 in a way that conflicts with a relevant decision of this Court---Reeves

v. Sanderson Plumbing Products, Inc., 120 S.Ct.2097.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article Two, Section 4. The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. (Fifth Cause of Action of Original Complaint (Appendix Page 21)alleges a wilful disregard of Congressional Civil Rights Legislation by the Defendant cannot be considered an act less that a Common Law High Crime and Misdemeanor. See also Third Cause of Action of Amended Complaints (Appen Page 28)

STATUTORY PROVISIONS INVOLVED

EMPLOYMENT BY THE FEDERAL GOVERNMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e(16)(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes of ....

42 U.S.C. Section 2000e-3(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment....because he has opposed any practice made an unlawful employment practice by this subchapter...

U.S.C. 5 Section 3330a Preference eligibles;
(e)(2) A preference eligible may not pursue redress for an alleged violation described in subsection (a) under this section at the same time the preference eligible pursues redress for such violation under any other law, rule, or regulation.

U.S.C. 28 Section 2680 discretionary function exception from FTCA.

STATEMENT OF THE CASE

Introduction

This is a Federal Case. It involves two federal employees of a federal agency of the Executive Branch who allege an Act of Congress and several Federal Court Cases were violated by such agency in discrimination against them.

The case involves administrative remedies including the nearly one year Petitioner Hawkins spent with the EEOC and the months Petitioner Hobbs spent with the Office of U.S.Senator Harry Reid, Nevada, trying to correct the wrong before filing with the EEOC per the Senator's instructions.

The case involves the Office of the United States Attorney for Nevada who represented the U.S.Secretary of Commerce in the U.S.District Court, for Nevada, and the U.S. Circuit Court of Appeals, Ninth Circuit,

Finally the Case involves this Petition for a Writ of Certiorari to the U.S.Court of Appeals, 9th Circuit, which rendered a final judgment denying the rights of the two Petitioners on July 25, 2003.

FACTS OF THE CASE

The Amended Complaint states the pertinent facts involving two transactions or occurrences of employment---one by each of the two petitioners. These two transactions or occurrences are drawn together by a series of close factual relationships warranting joinder as Plaintiffs under Fed.R.Civ.P. 920(a). See. Moseley v General Motors Corp.(8th Cir. 1974), 497 F.2d 1330, 1333.

Each petitioner suffered an adverse employment action as a result of conversations each had with the Regional Census Director on February 19, 1999, wherein each questioned the legality of features of an Hispanic Hiring Order the regional office had made. Hobbs offered direct evidence that he was denied a return to employment after finishing his first assignment because of that meeting. Hawkins was terminated just three weeks after his

conversation with only pretextual reasons given, ie he received three reasons at termination which were later changed to approximately nine different reasons for which pretextual proof has been offered against each point. (See Section III of Motion for Summary Judgment, Appendix H at Page 29)

Each petitioner made substantial efforts to be reinstated before going to sources outside of the employer. Hawkins spent nearly a year with the EEOC and Hobbs spent several months working with the office of U.S.Senator Harry Reid, Nevada, who put Hobbs in touch with the Census Director. When the Senator concluded he advised Hobbs to file with EEOC which Hobbs did promptly.

Hawkins filed a complaint in District Court on May 10, 2000(Appendix F Page 16) and filed a Motion to Join Hobbs which was so ordered by the U.S.District Court on February 6, 2001.(Amended Complaint at Appendix G Page 23).

The District Court vacated its joinder Order in an Order filed on October 18, 2000.

The District Court next Ordered Summary Judgment for the Defendant against Petitioner Hawkins and entered and served a denial of Reconsideration on August 20, 2002.

Petitioner Hobbs filed a Complaint with the U.S.District Court in Reno(CV-N-01-0607-HDM(VPC) which concluded Hobbs had failed to exhaust his administrative remedy (EEOC) and was not entitled to file the action. Hobbs appealed to the U.S.Circuit Court of Appeals, 9th Circuit No.02-17095 which affirmed the District Court in a Memorandum filed April 4, 2003. Reconsideration was denied. These actions didn't go to the merits of the case but considered only two issues of qualification to sue in U.S.District Court. The two Panels of C.A.9 and the two District Courts differ on what course Hobbs should have pursued. Hobbs relied on the 'single filing rule' wherein any plaintiff qualified under Fed.R.Civ.P. 20(a) may join another plaintiff who did utilize the full administrative remedy. See. EEOC. v. Wilson Metal Casket Co., 24 F 3d 836 (6th Cir. 1994)

B PROCEEDINGS BELOW

The District Court.
Relating to Question One and three errors:

1. The Court had joined the Petitioners because the Defendant failed to respond and Local Rule 7-2(d) of court requires such non- response to be deemed as consent. The Court allowed the Defendant to present a motion for reconsideration even though the court would later rule against a Plaintiff's Motion for Reconsideration ruling 'a motion for reconsideration is an improper procedural vehicle by which to rehash old arguments or to advance theories of the case that could have been presented earlier.

2. In ruling to vacate joinder (App.C,p.3) the Court allowed a contention of the Defendant that Petitioner Hobbs failed to exercise his proper administrative procedure in not filing with the Secretary of Labor under VEOA Statute U.S.C. Ch.5, Section 3330a(e)2 which clearly reads that Hobbs could not have filed with the VEOA as he was pursuing another discrimination remedy that of Title VII of the Civil Rights Act of 1964. See. Brock v. U.S 64 F3d 1421(9th Cir.1995). 1422. Title VII is the exclusive pre-emptive administrative and judicial scheme (available) for the redress of federal employment discrimination. Hobbs was later heard by the District Court in Reno, Nevada, which rightly ruled that EEOC is the prescribed administrative remedy for Title VII discriminations.

3. The District Court following the lead of the Defendant's Attorney misstated Fed. R. Civ. P. 20(a) Permissive Joinder to favor the Defendant.

Relating to Question Two and Seven Errors.(App.E.p.10)

1. The District Court ruled that four of the five causes of action in the original complaint 'sounded in Tort' and Hawkins should have filed with the FTCA. Title 28 Section 2680 of the FTCA law clearly states that employment decisions are discretionary within the meaning of the FTCA discretionary function exception.

2. The District Court ruled Hawkins 'offered no evidence other than a training schedule to demonstrate the reasons for termination were pretextual'. In truth Hawkins had filed his own Motion for Summary Judgment, a Motion for Default Judgment, and a Motion for Sanction against the Defendant and all three motions, ignored by the District Court, offered evidence the reasons given by Defendant were pretextual. Additionally the Plaintiff's complaint which the Court was required to treat as true for the Summary Judgment Motion had numerous allegations of direct facts relating to pretext. See Section III of the Plaintiff's Motion for Summary Judgment, showcasing the Reeves decision, at Appendix H page 29 showing each point of the employer's legitimate reason is shown to be false.

3. The District Judge made an improper conclusory judgment in ruling 'the deficiencies in Plaintiff's job performance go well beyond any lack of training in auditing payroll..' Such a strong bias against Hawkins would not allow the Judge to give him the presumptions of pro se and opposing party and read his complaint as true. It would seem that the Judge is playing the role of personnel director and this Court should take Judicial Notice of the full egregious error of law and Judicial conduct. Again this Court's Reeves v. Sanderson at 2110 states the trial judges duty well, 'the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weight the evidence.'

4. It is unclear if the Court is following the Defendant's argument that there were no contested facts for trial but his honor fails to note that the Defendant had presented 36 alleged material facts not in dispute and Plaintiff clearly contested numbers eight, nine, and ten in his Response. In Defendant's original answer all twenty-nine clauses of the complaint were denied either fully or partially; however, Defendant did accept all as true for summary judgment---the Court also was required to do so but apparently did not. See. Blue v. Widnall, 162 F.3d 541.

542 (9th Cir. 1999) Key 12:Federal Civil Procedure: 'On motion for summary judgment applicant needs to produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext in Title VII action.

5. The District Court engages in repeated dishonest characterizations of the Plaintiff's complaint as alleging ..age discrimination' and 'hostile work environment' when the complaint was strictly a discrimination claim of retaliation because Plaintiff had opposed illegal acts. Hawkins's presentation to EEOC was much broader than the complaint and any mention of the racism, ageism, and hostility in the complaint was strictly to give understanding to the Defendant and the Courts. Such erroneous conclusions by the Court are further proof that the Trial Judge had formed an improper bias and seemed passionately bent on following the contentions of the Defendant.

6. The District Court's order again (See Question One part 1 above) again has trouble following the Court Local Rule 7-2(d) requiring the Court to rule for the plaintiff on his Motion for Default Judgment as the Defendant failed to respond and the rule requires such failure to respond be deemed consent. It is legal hypocrisy of the first water for the Defendant and the lower courts to insist that Hobbs had failed to go to the wrong place, VEOA, in a timely manner while these same parties make every excuse for the Defendant 's failures to respond to two Motions by the Plaintiff and then let him off the legal hook of the Court's own local rule. Petitioners respectfully request this Court to take judicial notice that the U.S.District Court had definitely played a favorite.

7. Perhaps the most egregious of the manifest errors of the District Court was ignoring the leading case on employer pretext, Reeves v. Sanderson Plumbing Products Inc 120 S.Ct. 2097, where at 2112 Justice Ginsberg opines .'This Court today holds that an employment discrimination plaintiff may survive judgment as a matter of law by submitting two categories of evidence...a prima facie case and ...evidence from which a rational trier of fact could

conclude that the proffered explanations for its actions was false....' Clearly the District Court allowed the prima facie case but just as clearly failed to credit Section III, page 4-10 of Plaintiff's Motion for Summary Judgment (Appendix H at page 29)) containing complete evidence which was required reading for the Court.

B. The Court of Appeals:

Relating to Question Three and Five Errors

A panel of the U.S.Court of Appeals for the Ninth Circuit---RYMER, KLEINFELD, and FISHER---reviewed the District Court Orders, above, and affirmed for the Defendant on April 16, 2003. Such panel denied petitioner's petition for panel rehearing and denied rehearing en banc on July 25, 2003.

1-The Panel affirmed the clearly erroneous FTCA remedy theory offered by the Defendant and the District Court in Question Two-1 above.

2-The Panel also joined in the dishonesty of the District Court by characterizing Hawkins' claim in District Court to include age discrimination and hostile work environment. See Question Two-5 above. Again Petitioner Hawkins, given only dishonest reasons for his termination, did present a plethora of very possible potential causes to the EEOC but the complaint alleges only discrimination by retaliation for opposition to acts made illegal by Title VII. The Defendant and the lower courts seem to delight in misreading a simple pro se statement of the facts in the complaint. Perhaps the Defendant should be more concerned that the aspects of ageism, racism, and hostility presented to the EEOC were allowed to occur without censure in ELCO 3132.

3. The Panel falls into the same error the District Court made in failing to read the Plaintiff's Motion for Summary Judgment, Part III,(Appendix H page 29) and wrongfully concluding plaintiff

failed to prove pretext. Since the Reeves case had not been published at the time Hawkins filed in District Court on May 10, 2000 it wasn't possible to plead it. The Amended Complaint pleaded the Reeves case in paragraph VII (Appendix G page 23) wherein the Petitioners suggest that had the Reeves ruling come a year earlier it is very possible that EEOC would have found pretext as well as the prima facie case.

4-The Appellate panel jumps ahead of the District Court which allowed Hawkins a prima facie case and ruled Hawkins failed to present sufficient evidence of causal link between his complaints about discriminatory hiring practices and his termination. Clearly such panel couldn't have taken the time to read paragraphs VII-XV of the Original Complaint (Appendix F page 16)) and paragraph VII of the Petitioners Amended Complaint (Appendix G page 23)) wherein it is noted that EEOC allowed Hawkins a prima facie case which would include the causal connection between the multitude of protected activities including the conversation with the Regional Director just three weeks prior to the March 12, 1999, termination. Whereas Hobbs alleges only one protected conversation, Hawkins had dozens with every level of management up and including the Regional Director. It should be noted that full control of payroll and personnel was maintained at the Regional Office.

5-The final error in the panel's ruling is possibly the most egregious of all the errors and the most senseless. The panel bought into the dishonesty utilized by the Defendant and the District Court of playing word games with Fed. R.Civ.P. 20(a) and offers the same dishonest reasoning that the petitioner's 'employment actions do not arise out of the same transaction(rather than transactions or occurrences) and do not raise common questions of law or fact.(rather than some question of law or fact common to all) See Mosley v. General Motors Corporation F2d 1330,. 1333 (8th Cir1974).

REASONS FOR GRANTING THE WRIT

1. The court should grant the writ to send a clear message that the Civil Rights Laws of United States will be respected by the Supreme Court; That U.S.District Courts can't expect any slack in this Court's zeal to see Civil Rights Laws followed; Courts engaging in wilfully misstating the law, ignoring their own rules and prior findings, and playing favorites will be reversed; Appellate Courts must be required to supervise the District Courts and the full membership of the Ninth Circuit Court of Appeal must realize that each panel must follow the law. Such a message will quickly be picked up by the Offices of the United States Attorneys to prevent intentional departures from the law. If the Offices of the United States Attorney don't like the law let them lobby the President to request the Congress to amend the laws or repeal them.
2. The Court should grant the Writ because this case has an imperative public importance. No law against discrimination is better than the treatment the least important employees gain from it. Title VII was amended in 1991 to include ALL Federal Employees with very few exceptions. Those at the bottom have the greatest need of the majesty of the law to insure their rights.
3. The Court Should Also Grant This Writ to Remind U.S.District Courts and the Circuit Courts of Appeal to pay close attention to Supreme Court Rulings that relate to the facts of the case and especially when a recent landmark ruling such as Reeves v. Sanderson Plumbing not only relates to the central issue of the case but is actually cited in the Amended Complaint of the Joint Petitioners. Reeves fits this case like a fine leather glove.
4. The Court Should Also Grant This Writ to Remind the United States District Courts and the U.S. Courts Of Appeal That It Is Their Legal duty to follow The Law Including their own rules and to insure that their frequent users from the U.S.Attorney's Offices also get a new feeling of urgency to strictly follow the Civil Rights Law and Federal Rules of Procedure. Such Courts have a Duty to Read each Statute and Case That It Offers In Support of Written Opinions and avoid the temptation of relying too heavily on government attorneys advocating for only one of the parties.

With proper supervision a District Judge can be encouraged to play it straight.

5. The Court Should Grant This Writ To Serve As A Mandatory Requirement to Give Pro Se Plaintiffs/Appellants Their deserved presumptions and prevent the legal assault by government attorneys backed up by overly friendly District and Appellate Courts. The error-filled orders did do an exceptional job in presenting the law relating to unrepresented parties and the parties opposing judgment as a matter of law; the Courts just failed to listen to their own advice. Send the message that this Court will protect the government when it is legally right and rule against it when it is legally wrong. The Rule of Reeves must apply to the District and Circuit Courts and U.S. Attorneys who practice therein---dishonesty in Federal Practice will not be tolerated.

CONCLUSION

For the foregoing reasons the Petitioners respectfully request the Court to grant their petition for certiorari.

RICHARD HOBBS
Petitioner, pro se
2585 Pleasant View Pl
Sparks, NV 89434
(775)356-0905

MAX E. HAWKINS
Petitioner, pro se
2930 El Camino Road
Las Vegas, NV 89146
(702) 252-3503

APPENDIX

APPENDIX A

FILED April 16, 2003
CATHY A. CATTERSON
CLERK, U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
MAX E. HAWKINS, Plaintiff-Appellant,
pro se
v.
DONALD L. EVANS, Secretary of Commerce, United States Department of Commerce, Defendant, Appellee.

No.02-17137
D.C.No.
CV-00-00585-KJD(PAL)
MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding
Submitted April 7, 2003**

Before: RYMER, KLEINFELD, and FISHER, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P 34(a)(2)

Max E. Hawkins appeals pro se the district court's order granting summary judgment and order denying reconsideration in Hawkins's action alleging discriminatory and retaliatory discharge. We have jurisdiction pursuant to 28 U.S.C.Section 1291. We review de novo summary judgment, Ray v. Henderson, 217 F.3d 1234, 1239 ((Th Cir.2000), and review for abuse of discretion denial of reconsideration, Sch.Dist.No 1JV.ACand.S., Inc., 5 F3d 1255, 1262(9th Cir.1993). We affirm.

Because Hawkins failed to raise a genuine issue of material fact as to whether defendants' proffered reasons for his termination- that Hawkins lacked knowledge of basic

administrative concepts, improperly audited and controlled payroll and personnel documents, lacked good communication with other managers, and could not perform at the level required -- were pretextual, the district court properly granted summary judgment on Hawkins's age discrimination claim. See Villiarimo v. Aloha Island Air, Inc.,281 F.3d 1054, 1062-63 (oth Cir.2002). Hawkins also failed to present sufficient evidence of a causal link between his complaints about discriminatory hiring practices and his termination. See O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756,763 (9th Cir.1996).

To the extent Hawkins alleged that he was subjected to a hostile work environment, the district court properly granted summary judgment on this claim because Hawkins failed to present evidence to show severe or pervasive harassment sufficient to alter the terms of employment. See Ray, 217 F.3d at 1254.

The district court properly dismissed Hawkins's claim under the Federal Tort Claims Act because Hawkins failed to exhaust his administrative remedies. See Jerves v. United States, 966 F.2d 517, 521 (9th Cir.1992).

Because Hawkins failed to demonstrate any basis for relief from judgment, the district court did not abuse its discretion by denying Hawkins's motion for reconsideration. See Sch.Dist.No. 1J, 5 F.3d at 1262-63.

The district court also properly denied Hawkins's request to join Hobbs as a party under Fed.R.Civ.P.20 (a) because Hawkins's and Hobb's employment actions do no arise out of the same transaction and do not raise common questions of law or fact. See Coughlin v. Rogers, 130 F.3d 1348, 1350 (Oth Cir.1997) (stating standard for joinder under Fed.R.Civ.Pro.20 (a)).

Hawkins's remaining contentions lack merit.

AFFIRMED.

APPENDIX B FILED JUL 25 2003
CATHY a. CATTERSON, CLERK
U.S. COURT OF APPEALS

ON APPELLANT'S PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC.
Before: RYMER, KLEINFELD, and FISHER, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed.R.App.P.35.

The petition for panel rehearing and petition for rehearing en banc are denied.

No further filings shall be accepted in this closed appeal.

APPENDIX C
Entered And Served Oct10,2000 Clerk U.S.District Court
District of Nevada

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
Max E.Hawkins, and Richard Hobbs, Plaintiffs
v.
Donald L.Evans, Defendant Case No. CV-S-00_0585-KJD-(PAL)
ORDER

The Court has before it Defendant.s Rule 59(e) Motion for Reconsideration (#18). Plaintiffs filed a response in opposition (#23) as well as an amended response (#24). Defendant then filed a reply (#25). The Court has also considered Plaintiffs' Motion for Reconsideration and to Disallow Reconsideration (#26); Defendant's Motion to Strike Plaintiffs' Surreply (#28); and Defendant to Stay Deadline to File Dispositive Motions (#29). For the reasons that follow, the motion for reconsideration will be granted.

I. BACKGROUND.

ON December 18, 2000, On December 18, 2000, Plaintiff Hawkins, a pro se litigant, filed a request for leave to amend his

complaint. Specifically, Plaintiff Hawkins sought to join Plaintiff Hobbs to his complaint pursuant to Rule 20 of the Federal Rules of Civil Procedure. Before addressing the merits of this request, the Court ordered Plaintiff Hawkins to file proof of service that Defendant was properly notified. In response to this order, Plaintiff Hawkins filed a certificate of mailing (#14) on January 2, 2001. Apparently, Plaintiff Hawkins never informed Defendant either verbally or in writing about filing the certificate given Defendant's failure to object to the joinder of Plaintiff Hobbs. On February 6, 2001, the Court granted Plaintiff Hawkins' motion for leave to amend because the Defendant failed to object, which under the local rules constitutes consent. SEE LR 7-2(d)

In the Amended Complaint, Plaintiffs allege different theories of discrimination against different supervisors in different localities. The Amended Complaint states that Plaintiff Hawkins was discriminatorily fired while working in Las Vegas. Plaintiff Hawkins was allegedly discriminated against based on his age, race, national origin, disability and in retaliation for opposing discriminatory practices. On the other hand the Amended Complaint states that Plaintiff Hobbs was not hired for a position in Reno because a regional director told subordinates not to hire him and his veteran status was not considered during the hiring process in violation of the Veterans Employment Opportunities Act of 1998 (.VEOA.), Pub. L.No.105-339, 112 Stat. 3182.

In response to both this Court's Order (#17) dated February 6, 2001 and the Amended Complaint, Defendant filed the instant Rule 59(e) motion for reconsideration. In his motion Defendant principally argues that leave to join was improper because: (1) Plaintiffs failed to comply with the prerequisites of Rule 20(a) of the Federal Rules of Civil Procedure; and (2) Plaintiff Hobbs. claims are improperly before the Court due to his failure to exhaust his administrative remedies under the VEOA.

After Defendant.s motion for reconsideration was fully briefed, Plaintiffs filed their Motion to Strike Defendant's Reply to Response of Plaintiff to Defendant.s Motion for Reconsideration and to Disallow Reconsideration (#26), seeking to strike Defendant's reply because it raised no new arguments. In response to Plaintiffs'

motion to strike, Defendant filed Motion to Strike Plaintiffs' Surreply (#28), arguing that Plaintiffs' motion to strike is a fugitive document not authorized by either the Federal Rules of Civil Procedure or the local rules of this district. Additionally, Defendant filed Motion to Sty Deadline to File Dispositive Motions (#29) as the deadline for such motions would pass before resolution of the reconsideration motion. Plaintiffs have yet to file a response to this latest motion.

II ANALYSIS

Reconsideration is appropriate if the Court is (1) presented with newly discovered evidence; (2) committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law. See Sch.Dist.No. 1J, Multnomah County, Or. V. AcandS.Inc.5 F3d 1255, 1263 (9th Cir.1993). Here, the Court finds that reconsideration is warranted given that in light of the Defendant's evidence the Order is in clear error.

A. Hobbs' VEOA Claims.

The VEOA prohibits governmental agencies from violating an individual's rights relating to veteran preference. *See* 5 U.S.C Section 3330a(a)(1). An individual who alleges such a violation must first initiate a claim by filing a complaint with the Secretary of Labor. See id. This written complaint must be filed within sixty days of the alleges violation. See id. Section 3330a(a)(2)(A)&(B). While the complaint is pending before the Secretary of Labor, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board .MSPB.. See id. Section 3330a(d)(1). However, the complainant may only bring a Board appeal after sixty days have passed since the complaint was filed with the Secretary of Labor, or within fifteen days of the date the complainant receives written notification from the Department of Labor that it has been unable to resolve the complaint. See id. Section 3330a(d)(I)(A)&(B). Moreover, an appeal to the MSPB may not be brought unless the complainant provides written notification to the Secretary of Labor of his intention to bring such an appeal. See id Section 3330a(d)(2)(A). While the complaint is pending on appeal before the MSPB, a complainant may then elect to terminate these administrative proceedings and file a judicial action with the

appropriate district court. See id Section 3330b(a). However, before a complainant may elect to pursue this judicial redress, the election must be in writing and in accordance with MSPB regulations. See id. Section 3330b(c).

Here, Plaintiff Hobbs has failed to provide any proof that he properly exhausted his administrative remedies concerning his alleged VEOA violation. There is no indication that he ever filed a complaint with the Secretary of Labor, that he then properly appealed the violation to the MSRB, or that he properly sought judicial redress. Furthermore, the statute contains no provision for the waiver or these requirements. Accordingly, Plaintiff Hobbs' failure to follow the administrative procedures deprives this Court of jurisdiction over the alleged VEOA violations. See, e.g., Moore v. Merit Sys.Prot.Bd. No. 01-3001, 2001 WL 502036, at *3(Fed.Cir.May 10, 2001) (unpublished table decision)(finding that MSPB properly dismissed appeal for lack of jurisdiction when VEOA complainant failed to exhaust remedies with Secretary of Labor); Sears v. Dep't of the Navy, 86M.S.P.R.76,79 (2000) (holding that the MSPB lacks jurisdiction over VEOA claims that have not been properly exhausted with the Secretary of Labor).

B Rule 20(a) of the Federal Rules of Civil Procedure.

In order for Plaintiffs' claims to be properly joined, they must satisfy the demands of Rule 20(a) of the Federal Rules of Civil Procedure. The rule states two requirements for proper joinder: (1) there must be a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) there must be some question of law or fact common to all persons seeking to be joined. See Fed.R.Civ.P.20(a); Alexander v. Fulton County, Ga. 207 F.3d 1303, 1323 (11th Cir.2000). Federal policy favors joinder. See United Mine Workers of Am. V. Gibbs, 383 U.S. 715, 724 (1966) (.Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.)

Even assuming Plaintiff Hobbs properly exhausted his administrative remedies, the Court would nevertheless, find that joinder pursuant to Rule 20(a) was mistakenly undertaken. First,

the transactions and occurrences underlying Plaintiffs' respective claims are diverse. Both Plaintiffs allege different adverse employment actions. Hobbs contends that he was not hired due to discrimination while Hawkins contends that he was discriminatorily fired. Furthermore, Plaintiffs were employed in different locations and in different capacities; Plaintiff Hobbs was a Field Operation Supervisor in the Reno Local Census Office and Plaintiff Hawkins was an Assistant Manager for Administration in the Las Vegas Local Census Office. Finally, Plaintiffs' respective complaints against the Census Bureau were filed at different times and against different supervisors.

Second, Plaintiffs' claims lack common issues of law and fact. As mentioned previously, both Plaintiffs allege different adverse employment actions. Moreover, both Plaintiffs request relief under different theories of liability. Plaintiff Hawkins contends that he was discriminated based on his age, race, national origin, disability, and in retaliation for opposing discriminatory practices. Plaintiff Hobbs, on the other hand, contends that Defendant violated the VEOA by not considering his veteran status during the hiring process. The only common elements among the claims are that both Plaintiffs allege some form of discrimination, both talked to the same regional manager who they believe did not like them, and both are suing the same nominal Defendant, the Secretary of Commerce. These common elements are too tenuous to justify Rule 20 joinder.

C Defendant.s Motion to Strike Plaintiffs' Surreply.

Surreplies are not sanctioned by the Federal Rules of Civil Procedure. See Garrison v. Northeast Georgia Med.Ctr., Inc., 66 F.Supp.2d 1336, 1340 (N.D.Ga.1999) (stating that the Federal Rules of Civil Procedure does not authorize parties to file surrreplies because such practice would put the courts in the position of refereeing an endless volley of briefs); Stairmaster Sports/Med.Prods., Ind. V. Pacific Fitness Corp. 916 F. Supp. 1049, 1050 n.1 (W.D.Wash. 1994). Moreover, there is no provision in the local rules of the District of Nevada for the filing of surreplies; in fact, Local Rule 7-2 only allows for the filing of motions, responses and replies. See LR 7-2(a),(b) &(c).Leave to file a surreply is

generally only granted in rare circumstances as where the movant improperly raises new arguments in a reply.'. Pehr v. Rubbermaid, Inc.,, Pehr v. Rubbermaid, Inc., 87 F.Supp.2d 1222, 1237 (D.Kan 2000).

Plaintiffs never sought leave to file their surreply guised as a motion to strike. Even if the Plaintiffs had sought leave, however, the Court would deny it because, according to the Plaintiffs, Defendant's reply .is merely a rehash of the Defendant's Motion[for reconsideration] and offers the same tired argument [sic].. Because Plaintiffs admit that Defendant's reply raises no new argument, Plaintiff' guised surreply is improper.

III. CONCLUSION.

Accordingly, IT IS HEREBY ORDERED that Defendant's Rule 59(e)Motion for Reconsideration (#18) is GRANTED.

IT IS FURTHER ORDERED that this Court's Order (#17) dated February 6, 2001 is **VACATED.**

IT IS FURTHER ORDERED that the Amended Complaint (#11) is **STRICKEN.**

IT IS FURTHER ORDERED that Defendant's Motion to Strike Plaintiffs' Surreply (#28) is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike Defendant's Reply to Response of Plaintiff to Defendant's Motion for Reconsideration and to Disallow Reconsideration (#26) is **STRICKEN.**

IT IS FURTHER ORDERED that Defendant's Motion to Stay Deadline to File Dispositive Motions (#29) is **GRANTED.** The parties shall have thirty (30) days from entry of this order to submit a revised briefing schedule for dispositive motions.

IT IS FINALLY ORDERED That to avoid a repeat of the problems this Order is addressing, in the future Plaintiff Hawkins must (1) serve Defendant by certified mail, return receipt requested, and (2) must file a certificate of mailing with the green return receipt card endorsed and attached before the Court will address a motion initially filed by him.

DATED this 30th day of August, 2001.

Signed by Kent J. Dawson United States District Judge

APPENDIX D
PLAINTIFF'S RULE 59(E) MOTION FOR RECONSIDERATION AND MEETING OF PARTIES IN CHAMBER

ENTERED AND SERVED
Oct. 18 2001
Clerk U.S.District Court
District of Nevada
BY DEPUTY S._____

RECEIVED AND FILED
Oct 17 4:41 PM '01
Lance S. Wilson,Clerk
By Deputy S._____

Presently, the Court has before it Plaintiff's Rule 59(e) Motion for Reconsideration and Meeting of Parties in Chamber (#31). Defendant filed a response in opposition (#33), to which Plaintiff replied (#34).

On December 18, 2000, Plaintiff filed a motion for leave to amend his complaint seeking to join Richard Hobbs as a party pursuant to Rule 20 of the Federal Rules of Civil Procedure. On February 6, 2001, the Court granted (#17) Plaintiff's motion for leave to amend because Defendant's failure to respond constituted consent under this Court.s local rules. Defendant promptly filed a motion to reconsider (#18) arguing that Plaintiff failed to comply with the prerequisites of Rule 20(a) and that Richard Hobbs had failed to exhaust his administrative remedies in correlation to his claims. Because Defendant.s arguments were meritorious, the Court entered an order vacating its February 6, 2001 order and striking Plaintiff's Amended Complaint. Plaintiff has now filed his own motion for reconsideration.

Reconsideration is appropriate if the Court is: (1) presented with newly discovered evidence; (2) committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law. See Sch.Dist.No.1J, Mulnomah County, Or. V. AcandS, Inc., 5 F3d1255, 1263 (9th Cir.1993).

Plaintiff does not argue that he has newly discovered evidence or that an intervening change in controlling law has occurred. Instead, he argues that the Court's order granting Defendant's motion for reconsideration is clear error and manifestly unjust. However, Plaintiff has merely reargued the merits of his pleadings

previously filed. Because a motion to reconsider is an inappropriate procedural vehicle by which to rehash old arguments or to advance theories of the case that could have been presented earlier, See Resolution Trust Corp. V. Holmes, 846 F.Supp. 1310, 1316 (S.D.Tex.1994), the Court will therefore deny Plaintiff's motion to reconsider. The Court notes that neither the instant ruling nor the other orders regarding Defendant's motion for reconsideration reflect the Court's position on the underlying merits of Plaintiff's claims. Rather, these orders reflect the underlying propriety of joining Plaintiff's and Hobb's claims in the same proceeding.

Accordingly, IT IS HEREBY ORDERED that Plaintiff's Rule 59(e)Motion for Reconsideration and Meeting of in Chambers (#31) is DENIED.

DATED this 17th day of October, 2001.

S. Kent J. Dawson
United States District Judge

APPENDIX E

ENTERED AND SERVED JUL 10, 2002 CLERK, US DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MAX E. HAWKINS, Plaintiff, Case No.CV-S-00-0585-KJD(PAL)
V. ORDER
DONALD L. EVANS, Secretary

of Commerce, United States
Dept. Of Commerce, Defendant

I. INTRODUCTION

Presently before the Court is Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment (#39). Plaintiff filed an opposition (#40). No reply has been filed.

II. FACTUAL BACKGROUND

Plaintiff has filed this suit alleging age discrimination and retaliatory discharge arising out of his employment as a temporary employee of the Bureau of the Census (.Census Bureau.). Plaintiff, the Assistant Manager for Administration (AMA), alleges that a pattern of harassment and discriminatory treatment began in January 1999 after he advised the Assistant Manager for Recruiting (AMR) that he was required by law to hire an African-American disabled veteran as Recruiting Clerk. After the African-American was hired, Plaintiff claims that the AMR and Assistant Manager for Field Officers (AMFO) created a hostile work environment by making harassing comments about Plaintiff's age.

Plaintiff attended a management meeting at which the Area Manager Sam Martinez expressed dismay that more Hispanics were not employed in Las Vegas and indicated that he wanted to see more Hispanics hired. Mr. Martinez followed up with Plaintiff by phone and inquired whether efforts had been made to hire more Hispanics. After Plaintiff informed his manager of Mr. Martinez.s inquiry, the manager allegedly became agitated and remarked, .I don.t want that son of a bitch calling any of my people.. · Plaintiff states that, as a result of his ensuring that non-discriminatory hiring practices and other personnel practices were followed, He was terminated on March 12, 1999.

However, Defendant maintains that Plaintiff's poor job performance is the sole reason for his termination. In support of their contention, Defendant relies on testimony from Jay Tilkens, Administrative Specialist. Mr. Tilkens was sent from the Denver Regional Control Center to review the administrative systems in Las Vegas. After his review, Mr. Tilkens concluded that Plaintiff was not capable of performing his tasks at the required level. It was at

this point that Plaintiff was terminated.

On March 15, 1999, Plaintiff sent a letter to Ms. Lain, Regional Director, protesting his dismissal and requesting that the Las Vegas Early Local Census Office (ELCO) be audited by an independent auditor. Mr. Bellamy, who replaced Sam Martinez as Area Manager, conducted a review and determined that twelve areas need further investigation. Interviews with certain employees revealed that there was .some kidding about age, but nothing extreme or bad.. After discussing Mr. Bellamy.s findings, Ms. Lain ultimately found no reason to reverse the dismissal.

III LEGAL STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment is a procedure which terminates, without a trial, actions in which .there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.. Fed.R.Civ.P.56(c). A summary judgment motion may be made in reliance on the .pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.. Id.

A movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate .specific facts showing that there is a genuine issue for trial.. Celotex Corp. V. Catrett, 477 U.S. 317, 324, (1986)(quoting Fed.R.Civ.P.56(e)) In order to preclude a grant of summary judgment, the non-moving party must do more than show that there is some .metaphysical doubt. as to the material facts. See Matushita Elec. Indus. Co. V. Zenith Radio, 475 U.S. 574, 586,(1986). The court will view all underlying facts in the light most favorable to the non-moving party. See Martinez v. City of Los Angeles, 141 F.3d 1373, 1378 (9th Cir. 1998)citing Matsushita Elec. Indus. Co., 475 U.S. at 587).

Although the non-moving party has the burden of persuasion, the party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. See Metro Indus., Inc. V. Sammi Corp., 82 F3d 839, 847 (9th Cir. 1996). That burden is met by showing an absence of evidence to support the non-moving party's case. See Celotex Corp. 477 U.S. at 325. The burden then shifts to the respondent to set forth specific facts

demonstrating that there is a genuine issue for trial. See Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). In meeting this burden, parties seeking to defeat summary judgment cannot rest upon allegations of denials of pleadings, but must demonstrate a genuine issue for trial. See Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir.1995). Under Rule 56(e), the adverse party must allege specific facts supported by affidavit that raise triable issues. See id. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. See Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996)

Moreover, when a plaintiff appears pro se, his complaint and pleadings are held to less stringent standards than formal pleadings drafted by lawyers. See Hughes v. Rowe, 449 U. S. 5, 9 (1980). In civil rights cases, a plaintiff's pro se pleadings are construed liberally and the plaintiff is afforded the benefit of any doubt. See Karim-Pahahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir.1988)(citations omitted): see also Hamilton v. United States, .67 F.3d 761, 764 (9th Cir.1995). However, '{even a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that are not initially plad.. Pena v. Gardner, 976 F.2d469,471 (9th Cir.1992)(quoting Ivey v. Board of Regents of the Univ of Alaska, 673 F.2d266, 268 (9th Cir.1982).

IV. LEGAL ANALYSIS

In his first cause of action, it appears that Plaintiff alleges that he was terminated for his opposition to Defendant's alleged discriminatory hiring practices. In order to state a claim under Title VII, Plaintiff must establish three elements: (1) that he engaged in a protected activity; (2) that he suffered an adverse employment action: and (3) that there is a causal link between the protected activity and the adverse employment action. Tarin v. County of Los Angeles, 123 F 3d 1259, 1264 (9th Cir. 1997), cert denied, 513 U.S. 1082, (1995).

In the absence of direct evidence to establish discrimination, courts apply the burden-shifting analysis set forth in McDonnell Douglas and its proteny. See McDonnell Douglas Corp. V. Green, 411 U.S.792, 802-04 (1973). Under the McDonnell Douglas burden-shifting analysis, a plaintiff bears the burden of establishing by a

preponderance of the evidence a prima facie case. Once established, the burden of proof shifts to the employer to articulate a legitimate, non discriminatory reason for its actions. The burden then shifts back to the plaintiff to prove that the employer's articulated non-discriminatory reason for its action was merely pretextual. Id. At 802-04. This analysis also applies to retaliatory discharge claims. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S.133, 146-47 (2000).

The Court will assume that Plaintiff has established a prima facie case of retaliation in accordance with the finding made by the U.S.Department of Commerce in its Final Decision regarding Plaintiff's discrimination complaint. The burden now shifts to the employer to articulate legitimate, nondiscriminatory reasons for the termination. Defendant advances several reasons based on Plaintiff's job performance that prompted his termination. For example, Defendant has submitted exhibits that indicate Plaintiff lacked knowledge of basic administrative concepts, was not properly auditing and controlling payroll and personnel documents, lacked good communication with the other managers, and could not perform at the level required.

It is not necessary that the Defendant make the correct decision to terminate the Plaintiff. Defendant need only believe the reasons stated in support of termination and act in good faith based upon those beliefs. See Bullington v. United Air Lines, Inc, 186 F.3d 1301, 1318 (10th Cir. 1999). There is sufficient evidence before the Court to find that Defendant acted in good faith when it terminated Plaintiff. Accordingly, Plaintiff is now required to show that the reasons advanced by Defendant were pretextual.

In rebuttal, Plaintiff argues that the evidence produced by Mr. Tilkens should be discounted because he did not have sufficient personal knowledge regarding Plaintiff's work to find that his job performance was unacceptable. He also argues that Mr. Tilkens faulted him for not having knowledge in a particular area when he had not received the proper training at the time of Tilkens review. Ms. Lain and Mr. Bellamy conducted a comprehensive review of the claims made by Plaintiff and found no reason to reverse the decision to terminate Plaintiff. Plaintiff has offered no evidence,

other than the training schedule, to demonstrate that the reasons advanced were pretextual. The deficiencies in Plaintiff's job performance go well beyond any lack of training in auditing payroll. Plaintiff's training schedule and unsubstantiated allegations that his supervisors refused to hire Hispanics and that his job performance was unacceptable are insufficient to demonstrate a triable issue of fact as to whether the legitimate, non-discriminatory reasons were pretextual. Therefore, Defendant's motion for summary judgment on Plaintiff's first cause of action is granted.

Defendant also seeks dismissal of Plaintiff's remaining causes of action for failing to exhaust his administrative remedies under the Federal Tort Claims Act (FTCA). Plaintiff maintains that he was unaware that his claims .sound in tort.. A review of the complaint is not particularly helpful in determining under which theory Plaintiff wishes to proceed. Each cause of action does appear to either contain the word negligence and'or specify an intentional tort. Therefore, Defendant's interpretation that the remaining causes of action sound in tort appears to be valid.

Defendant is correct that under the FTCA, claimants are barred from bringing suit in federal court until they have exhausted their administrative remedies. See 28 U.S.C.Section 2675(a)(2000). The failure to file an administrative claim under the FTCA is a non-waivable jurisdictional requirement. McNeil v. United States, 508 U.S.106, 113 (1993). Plaintiff's assertion that he did not know he was required to exhaust his administrative remedies is insufficient to confer jurisdiction under the FTCA. As a result, the remaining causes of action must be dismissed.

V. CONCLUSION

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment (#39) is GRANTED. This case is now dismissed.

IT IS FURTHER ORDERED that Plaintiff's Request to Enter Default (#43) based on the purported lack of opposition to Plaintiff's Motion for Summary Judgment (#41) is DENIED as moot.

DATED this 8th Day of July, 2002.

S. Kent J.Dawson U.S.DISTRICT JUDGE

APPENDIX F

RECEIVED AND FILED
May 10, 12:34 PM 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

MAX E. HAWKINS, Plaintiff, pro se — COMPLAINT
V. — (Jury Demanded)
WILLIAM M. DALEY, Secretary of
Commerce, U.S.Dept.of Commerce — CV-S-00-0585-JBR-RLH

COMES NOW plaintiff above-named, pro se, and complains of Defendant as follows:

FIRST CAUSE OF ACTION

I. This is a civil right action based upon 42 U.S.C.Title VII of the 1964 Civil Rights Act as amended---Retaliation for Opposition to Acts made illegal by Title VII.

II. Plaintiff is a citizen, by consanguinity, of the United States and a resident of Clark County, Nevada, and at all times relevant herein was an employee of the Defendant.

III. Defendant William M. Daley is the Secretary of Commerce, Commerce Department, an Agency of the United Stats Executive Branch and responsible for the United States Census Bureau doing business in Clark County, Nevada, as CENSUS 2000 and at all times relevant was Plaintiff's employers.

IV. Plaintiff was recruited, tested, interviewed, investigated thoroughly and hired by Defendant as one of a four person management team to open, operate, and close Early Census Office (ELCO) Number 3132 in Las Vegas, Nevada, on or about November 16, 1998, for a term stated to extend to September 30, 2000 or the completion of his mission with Census 2000.

V. Commencing in January of 1999 Plaintiff, the Assistant Manager for Administration (AMA) was subjected to harassment and discriminatory treatment for advising he Assistant Manager for Recruiting (AMR) that he was required by law to offer the position of Recruiting Clek to an Afro-American Disabled Veteran listed above the line over all other eligible applicants on an eligibility list furnished by the Denver Regional Office. The Assistant Manager for Field Operation (AMFO) was the party who initially started the harassment and he was joined later in January, after the hiring of the Afro-American, by the AMR who would make insipid comments about the Plaintiff's age.

VI. On several occasions at Staff Meetings held by the ELCO Manager the AMFO would frequently criticize Plaintiff for not properly supervising the said Recruiting Clerk. Plaintiff advised the AMFO that the Clerk was not his employee but was supervised or not supervised by the AMR. Plaintiff did meed with the Clerk concerning the criticism and presented a report exonerating the Clerk to the ELCO Manager, The work environment became even more hostile to the Plaintiff.

VII. In January the Defendant acting through his ELCO Manager and AMFO hired one FX.Frank. Gilroy as the Field Operations Supervisor (FOS) for the Second wave of Address Listing. Mr. Gilroy had been the FOS for the First Wave of Census 2000 Activity in Las Vegas before the hiring of the ELCO Management Team. The FOS refused to take any directions from the Plaintiff. This attitude of the FOS was known to all of the Management team.

VII. During January and February of 1999 the FOS hired approximately thirty Crew Leaders and Assistant Crew Leaders and then approximately three hundred enumerators were hired to form the field forces of the second wave. The FOS consistently refused to follow the rules put down for hiring and this matter taken by the Plaintiff to both the AMFO and the Manager. For reasons unknown to the Plaintiff the FOS was allowed to do what he wanted despite Plaintiff's continuing protest. During this period the

Plaintiff was in frequent contact with the Regional Office concerning the hiring. Personnel and Payroll Administrators within the Denver Regional Office, where all Eligibility Lists and Rosters were created and maintained, were aware of the situation and simply worked around the violations of the rules. The Plaintiff participated in a weekly Tele-Conference with Regional Personnel and almost daily contact with various clerks who all knew the rules. The egregious and intentional disregarding of the rules by the FOS was never mentioned until the Plaintiff was terminated and thereafter it was blamed on the Plaintiff.

IX. Unknown to the Plaintiff at the time, the Area Manager, Sam Martinez had pressured the Regional Office to give the FOS more eligibility lists as quickly as possible and ignore the rules relating to hiring as the ELCO was in danger of falling behind schedule. Fear of falling behind schedule was worse than fear of the law.

X. On February 19, 1999, at the ELCO Kick Off Invitational Party, the Plaintiff, who had recently learned of the improper interference of the Area Manager into waiving Eligibility List requirements, discussed the matter with the Regional Director. She recognized the problem and said not to worry.

XI. At an ELCO management meeting believed held in February at the ELCO Area Manager Martinez expressed his deep concern and personal revulsion to coming into the Las Vegas ELCO and not seeing Hispanic Faces in our work force still being recruited. The need to hire a diverse work force had been stressed in several meetings held at the Regional Office and this message had been clearly given to the Plaintiff and the Manager and the AMFO and the AMR and the FOS and had been written about in the Las Vegas Press. He again stressed the need to hire more Hispanics and a Regional Technician worked with the ELCO management and the Plaintiff in an attempt to get more Hispanic names on the Hiring Lists.

XII. When Plaintiff discussed the matter with the FOS he learned

the FOS had a feeling that Hispanics didn't make good employees due to language deficiency. Plaintiff also learned the FOS shared the AMFOs attitude against the Recruiting Clerk and Disabled Veterans.

XIII. In February the Plaintiff received a call from the Area Manager Martinez who asked Plaintiff to report on efforts were being made to hire more Hispanics. After responding the Plaintiff went into the Manager's office and reported the telephone conversation. The Manager became very agitated and snapped, .I don't want that son of a bitch calling any of my people.. Plaintiff was shocked that his supervisor felt this way towards his supervisor and asked why such an attitude was being taken. Plaintiff had later conversation with the AMFO who also felt the Area Manager was cutting into the ELCO's authority and effectiveness.

XIV. On March 12, 1999, Plaintiff was discharged without warning because of his consistent opposition to personnel practices made illegal by said Title VII of the Civil Rights Act.

XV. The above described acts of Defendant willfully and maliciously ignored the law of EEO and the Hiring laws granting fairness for each applicant.

XVI. The direct result of the defendant's actions caused Plaintiff great harm and suffering.

XVII. Plaintiff filed a claim of discrimination for retaliation by Defendant---U.S.Department of Commerce, #99-63-00-530D--- May 6, 1999. Plaintiff has followed all requests by the EEO Officials of the Defendant Department and is entitled to file this action in the United States District Court as the said EEO Officials of the Defendant Department have surpassed the 180 day period of time for a resolution of Plaintiff's EEO Claim.

SECOND CAUSE OF ACTION

XVIII. Plaintiff repleads and realleges the allegations contained in paragraphs I through XVII as though fully set forth herein.

XIX. Failure to follow the legal procedures required by the Regional Office of the Defendant, and Defendant's ELCO 3132, resulted because of gross negligence of the Defendant in failing to Train and properly Supervise his Regional Director, Assistant Directors, Administrative Technicians, Area Managers, ELCO Managers, Assistant Manager, Field Operations Supervisors and Crew Leaders on the importance of following all of the rules of Equal Employment Opportunity and Employment Procedures designed to allow Equal Employment Opportunity to all employment applicants.

XX. As a direct result of the Defendant in meeting his duty to properly train and supervise his employees on all matters of the Civil Rights Laws of the United States the Plaintiff incurred greater harm and suffering.

THIRD CAUSE OF ACTION

XXI. Plaintiff repleads and realleges the allegations contained in paragraphs I through XX above as though fully set forth herein.

XXII. During the tenure of the ELCO 3132 Management Team and throughout the second tenure of the FOS, all of the management chain from FOS to Regional Director knew of the failure to follow the laws of hiring and of the variations from the Employment Law regulating the Eligibility Lists by members of the ELCO and the Regional Office.

XXIII. Failure to rectify the improper handling at the earliest possible level and the earliest time known is most wrongful and not in keeping with the Laws of the United States. Knowing and participating in this deception and then putting the blame on the one employee who was opposing all such illegalities known to him, the Plaintiff, is a malicious act of the first water demanding severe censure and judgment by this Court and meriting the most severe

damages at law be awarded the Plaintiff.

FOURTH CAUSE OF ACTION

XXIV. Plaintiff repleads and realleges the allegations contained in paragraphs I through XXIII above as if restated herein.

XXV. At the time of the change of the Area Manager for ELCO 3132, March 1, 1999, the Defendant's Management in ELCO 3132 and the Denver Regional Census Office, including his Regional Director, were aware of the allegations made by Plaintiff in the Paragraphs numbered I through XXIV yet not one mentioned the truthfulness of the situation to members of the EEO Function of the Commerce Department which investigated the claims presented by the Plaintiff on May 6, 1999 and subsequent.

XXVI. Such failure to come forward with the truth and stay an unnecessary EEO investigation that even at this date of filing has not been resolved in twice the length of time allowed for such an investigation has added to the emotional distress of the Plaintiff and forced the Plaintiff to spend months reviewing the Civil Rights Law of the United States preparing this legal action.

FIFTH CAUSE OF ACTION

XXVII For his Fifth Cause of Action the plaintiff restates and realleges each of the previous numbered paragraphs I through XXVI as if restated herein.

XXVIII. Despite full disclosure made in that Complaint No. 99-63-0053D to Defendant, his employees were allowed to negligently and intentionally disregard dozens of allegations of the Plaintiff to the harm of the Plaintiff, the disgrace of the Defendant, and disregard of the Civil Rights Laws of the United States. Such actions by the Defendant are made even more egregious and malicious when one notes the Defendant's EEO responsibility was created by the same Title VII that grants Plaintiff protection from such retaliation.

Such wilful disregard of Congressional Civil Rights Legislation by the Defendant cannot be considered an act less than a Common Law High crime and Misdemeanor.

XXIX. Defendant's conduct in ignoring Plaintiff's rights and allowing cover up investigations at all levels of his command has greatly added to the suffering of the Plaintiff.

WHEREFORE, Plaintiff prays for the following relief:

1. Reinstatement, with full back pay, benefits, and prejudgment interest.
2. Front Pay through completion of CENSUS 2000 if reinstatement is not feasible.
3. Compensatory damages as determined by Jury.
4. Punitive damages to be determined by Jury subject to Jury Instructions on Cause Seven (sic Five) above.
5. Costs of suit and amendment of Plaintiff's personnel record to reflect honorable service.
6. Permission to amend complaint and add Defendants if Discovery so directs.
7. Such other and further relief as the court may wish to entertain.

DATED this Tenth day of May in the year 2,000 A.D.

s. MAX E. HAWKINS, pro se.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
MAX E. HAWKINS, and
RICHARD HOBBS,Plaintiffs pro se
v. Case No.CV-S-00-0585-kjd-(---)
NORMAN Y. MINETA, Secretary
of Commerce, U.S.Dept. of AMENDED COMPLAINT
Commerce, Defendant (Jury Demanded)

COME NOW Plaintiff's, above named, pro se and complain of the Defendant as follows:

FIRST CAUSE OF ACTION

I. This is a civil rights action based upon 42 U.S.C. Title VIII of the 1964 Civil Rights Act as amended---Retaliation for Opposition to Acts made illegal by Title VII.

II. Plaintiffs are citizens of the United States; Plaintiff Hawkins a resident of Clark County, and Plaintiff Hobbs, a resident of Washoe County.

III. Defendant Norman Y. MINETA is the Secretary of Commerce, Commerce Department, an Agency of the United States Executive Branch and responsible for the United States Census Bureau doing business in all counties of Nevada as CENSUS 2000. Both Plaintiffs were employed by Census 2000 at various times as will be shown during 1998 and 1999. Plaintiff Hobbs additionally made application for two additional positions for Census 2000 during 1999.

IV. Plaintiffs were recruited, tested, interviewed, investigated thoroughly and hired by Defendant which is required to follow all

laws of Equal Employment Opportunity and appropriate regulations of the Office of Personnel Management. Such rules include a mandatory job offer to the highest rated Veteran of the Armed Forces of the United States being given disability points and appearing 'above the line' on a hiring list of applicants qualifying for a Census position. OPM and Defendant additionally have rules for the creation of hiring certification lists and the rules for using such list in the employment process.

V. Hawkins was hired as the Assistant Manager for Administration at Early Census Office Number 3132 in Las Vegas, Nevada, on November 15, 1998, and such service was expected to last until September of 2000 or the closing of the Las Vegas operation. On March 12, 1999, Hawkins was terminated and no valid reason given. Hawkins as the AMA was charged with the supervision and management of personnel matters for the Las Vegas Office and required two fellow Assistant Managers to offer a position to an Afro-American who appeared above the line for a position. Hawkins was retaliated against by these two Assistant Manager. One of the two Assistant Managers also had a Field Operation Supervisor who was allowed to hire several hundred field workers in a manner that didn't comply with OPM and Census requirements. Despite making every effort to get the FOS to comply the Manager of the Census Office retaliated against Plaintiff Hawkins by termination.

VI. During February Area Manager Sam Martinez met with Hawkins and the Las Vegas Staff and directed them to hire more Hispanics. Hawkins supported this request and worked with Regional Technician to gain knowledge of how to hire Hispanics. When Martinez called Hawkins to report on what he had done ELCO Manager Johnson exploded and said, 'I don't want that son of a bitch (Martinez) calling any of my employees.' Shortly thereafter Martinez was replaced by Bill Bella my as Area Manager and the Plaintiff was terminated nine work days later with pretextual reasons given him for his unexpected termination.

VII. Hawkins filed a claim for wrongful retaliation with the Equal Employment Opportunity Commission and was given a FINAL DECISION which granted that Hawkins had made a prima facie case against the Defendant but had not proven that the Defendant.s reasons for the termination were pretextual. Hawkins alleges many reasons given by the Defendant in the EEO investigation for his termination were false and were knowingly false. The United States Supreme Court ruling of Reeves v. Sanderson P)lumbing Co., in June of 2000---just days after the Commerce EEO had made its FINAL DECISION that such evidence of dishonesty may be presented to the trier of fact as proof of pretext. This decision recognizes widespread pretextual punishments.

VIII. Plaintiff Hobbs On February 19, 1999, while an employee of the Defendant, was called to attend the Open House for ELCO 3132 in Las Vegas, Nevada, by Area Manager Sam Martinez. During this Open House Plaintiff Hobbs talked with Regional Director Susan Lavin concerning the directive for hiring of minorities and questioned Director Lavin if Census directives might represent reemployment hiring quotas. This question was simply to advise Susan Lavin that she needed to clarify this point as many were questioning the procedure. Plaintiff Hobbs was to learn later that Director Lavin wanted to fire him for his question and that her misunderstanding of a simple attempt to help her Census 2000 follow the law in minority hiring caused him to lose the Reno LCOM position being considered shortly thereafter. It is significant to note that Plaintiff Hawkins also talked with Director Lavin at this Open House and clearly advised her of the violations of OPM employment policy in process with her Personnel employees in the Regional Office. She told Hawkins .not to worry. and then supported his termination just three weeks later.

IX. On 21 November 1999, Plaintiff Hobbs was told that the Reno Office needed someone for an operations job and when they requested the names of applicants from Denver that they could contact to hire, Plaintiff's name was at the top of the list, as an above-the-line preference Veteran. It is believed that Manager

Bella my considered following the law and offering the position to Plaintiff Hobbs but had to check with Director Lavin. The Reno office was directed to request a new list. When the new list arrived Hobbs' name was not on the new list. Hobbs was thus deprived of his legal right to be offered the position. After completing a tour of service with the Reno Census Office as the Field Operations Supervisor (FOS) learned that he was not given the LCOM position because Director Lavin still resented him. Hobbs' believed he was brining a serious matter of law to Director Lavin in his questioning and merely wanted to advise her of a problem. Instead Hobbs suffered malicious retaliation in being denied this position and the earlier LCOM position.

X. The above described acts of the Defendants against the Plaintiff's were wilful and malicious and in flagrant opposition to personnel practices made illegal by the Civil Rights Act of 1964 and Title VII of such Act. The Direct results of the Defendant's retaliatory actions caused each Plaintiff the loss of back pay from the retaliations until the closing of the Census Offices in Las Vegas and Reno.

XI. The Plaintiffs remained ready to serve Census 2000 even after the retaliations.

SECOND CAUSE OF ACTION

XII. Plaintiffs replead and reallege the allegations contained in paragraph I through XI as though fully set forth herein.

XIII. The Retaliation against the Plaintiffs was the result of gross negligence of the Defendant not properly training, supervising, and monitoring the actions of the Regional Office. The dishonesty of the Regional Director and Area Manager Bella my acting unlawfully towards each Plaintiff was wilful and malicious and compounds the anger and stress on the part of the plaintiffs. Clearly punitive damages would be allowed against any private business acting in a like manner.

XIV. Such failure of duty by Director Prewitt as the Chief Executive of the largest peace time employer---Census 2000---in allowing his Regional Director to run roughshod over the hiring laws in violation of the Plaintiff's's Civil Rights greatly compounded the anger, mental distress, and harm of the Plaintiffs. Census Director Prewitt admits, in a reply to Senator Reid's Office which questioned Prewitt concerning Hobbs's complaint, that Plaintiff Hobbs was given a 10 point veteran's preference but gives no valid reason for the refusal of the Defendant to hire Plaintiff Hobbs. Clearly, an applicant for Federal Service has been pre-qualified as eligible for the position when such applicant appears above the line on a requested certification list for hiring list as was Jon Grubbs, the Afro-American referred to in Paragraphs V and VI of the Original Complaint. It is understood by both Plaintiffs that the Defendant is required to offer the position to the first position on any certification of hiring list provided that first position is an above the line Veteran. To attempt a later qualification is to undo the OPM intention in creating a hiring atmosphere that gives credibility to all hiring practices mandated by the Congress and Executive Branch of Government including EEO and Affirmative Action laws.

THIRD CAUSE OF ACTION

XV. Plaintiff repleads and realleges the allegations contained in paragraphs I through XIV above as set forth herein.

XVI. During the tenure of Plaintiff Hawkins the entire Census management team, excepting Hawkins, from FOS Gilroy up to an including the Regional Director knew of the violations of OPM and Census employment policy and most knowingly participated in the violations.

XVII. The Defendant implies admission of this in the ANSWER to the Original complaint wherein the excuse is given that Manager Martinez and others feared they were 'falling behind schedule' and had to hurry up the hiring. It is a fact that ELCO management had nearly forty employees available to hire some three hundred part-

time enumerators in February 1999 but chose to violate the rules instead.

XVIII. The third cause of action adds a new dimension to the severity of the retaliation and cover-up from the Denver Regional Census Office, through the Office of a United States Senator, and into the Office of the Director of the United States Census Bureau. Clearly the Census Bureau, as a major arm of the Defendant, has maliciously and knowingly wronged the Plaintiffs for attempting to help carry out the Civil Rights Laws and employment regulations. Despite such clear warnings the pretextual process was carried out even through a complete complaint process by Hawkins and a limited process carried out by Hobbs. The extreme wrongfulness of Defendant's actions is rendered even more egregious when one notes that the EEO responsibility of the Defendant was created by the same Title VII that protects the rights of all employees including all employees of the Defendant. Defendant has clearly committed high crimes and misdemeanors. Such actions were liberally utilized in English common law and have not been repealed or superseded. Such laws therefore remain in force in the United States of America.

WHEREFORE, Plaintiffs pray for the following relief:

1. Full back pay, benefits, and prejudgment interest from the first Retaliation against each Plaintiff to the close of the employing Census Office in Las Vegas and Reno. Approximately nineteen months at FCOM pay for Plaintiff Hobbs and eighteen months of AMA pay for Plaintiff Hawkins.

2. Compensatory damages to be determined by a Jury for the anger, stress, and inconvenience and other mental sufferings endured by the Plaintiffs at the hands of the Defendant for these many months.

3. Punitive damages to be determined by Jury sufficient to send a wake up call to the Defendant and other Agencies of the United States Executive Branch of Government to rigidly enforce ALL Civil Rights of ALL Federal Employees.

4. Costs of suit.

5. Amendment of Plaintiff's personnel records to reflect honorable service and commendation for service to Census 2000 be awarded by the named Defendant MINETA or his successor

6. Permission to amend complaint and add Defendants if Discovery or Order of Court should so direct.

7. Such other and further relief as the Court might wish to entertain.

DATED this Eighteenth Day of December in the year 2,000 A.D.

s. MAX E. HAWKINS, Plaintiff, pro se

APPENDIX H

Part III Plaintiff's Motion for Summary Judgment, Filed In U.S.District Court, Nov. 19, 2001:

Part III--Pages 4-10 of Motion:

THE REASONS GIVEN BY MANAGER BILL BELLAMY FOR TERMINATION OF THE PLAINTIFF ARE PRETEXTUAL AND MAY BE TAKEN AS FALSE

Defendant alleges on page 19 of its memorandum of Points and Authority that it can articulate Legitimate Non-discriminatory Reasons for Terminating Plaintiff. Then on page 20 of the Points and Authority the Defendant claims that the Plaintiff has failed to rebut Defendant's Legitimate Non-Discriminatory Reasons.

Defendant's Counsel has limited the proof of the above two declarations to Numbers 8, 9, and 10 of th thirty-six STATEMENTS OF MATERIAL FACTS NOT IN DISPUTE.

Number Eight relates to Exhibit 8 of Defendant's Motion and portrays a report prepared on March 5, 1999, by the Assistant Personnel Manager for Payroll, Denver Region of the Census Bureau, a man named Jay Tilkens.

The Defendant paraphrases the Tilkens Reports thusly:

' Mr. Tilkens found a number of problems not only with action under Plaintiff's supervision, including personnel paperwork processing and incorrect data on payroll documents but also with Plaintiff's performance, including Plaintiff's lack of knowledge regarding basic administrative concepts, failure to audit important payroll documents, and lack of communication with other

manager...as a result of his review, Mr. Tilkens concluded that Plaintiff as not capable of performing his tasks at the required level.'

I was terminated one week after Mr. Tilkens made his review without ever having seen Mr. Tilkens letter. Tilkens was not in direct line of supervision of the Plaintiff and having spent less than several hours with the Plaintiff is not qualified to judge the totality of the Plaintiff's learning ability or capacity for difficult work in a constantly-changing badly-managed operation such as presented by the named Defendant, his Regional Manager and her Regional staff, and the Manager of the Las Vegas ELCO.

Throughout my questioning of my termination by letters (contained in the EEO and Defendant's volumes of attachments and exhibits) to the Regional Director and the Area Manager Bill BELLAMY (*who had been my second-level supervisor for only eleven days prior to my termination*) and through the EEO Investigation from May of 1999 through December of 1999 the Tilkens letter was deliberately withheld from Plaintiff. There are several dishonesties in the Tilkens letter which have been furnished to the Defendant in a two page answer to the Tilkens Report.

Tilkens didn't know that I hadn't yet been trained in Batching payroll records for computer entry. My training was due to commence in Denver during the week following my termination. He did not know that the Batching forms had not been delivered to the Las Vegas ELCO. Mr. Tilkins didn't know that I had hired payroll clerks. Mr. Tilkens claim is therefore false.

Tilkens's comments concerning the ELCO Map showing areas for 3131 and 3232 had been misplaced and implies Plaintiff had done nothing to get another map and correct the listing. The Regional Office couldn't furnish us a new map and I had discussed the matter with Mr. Tilkens several times and Mr. Tilkens advised me not to worry about it as there was no pay differential between the two numbered ELCOs.

Material Fact number 9 concerns a letter from Area Manager Bellamy to the Plaintiff wherein allegations given to Bellamy from the ELCO Manager Ken Johnson are given as reasons for Plaintiffs termination. The Bellamy letter and the Tilkens Report are

contained in the EEO Final Report of Investigation furnished Plaintiff only in December of 1999 and in the volumes of presentation to the Court by the Defendant. Plaintiff respects His Honors valuable time and is attempting to make His Honors reading only of the material and essential.

It is ironic that Mr. Bellamy quotes Manager Johnson that he had to stop Frank Gilroy and I from a confrontation, an argument, and another confrontation while Mr. Tilkens notes I had no influence with Frank nor did I take .managerial initiative toward FOS (Gilroy). One can't have it both ways. I pleaded with my Manager Johnson and Gilroy's Supervisor William Olds to force Gilroy to comply as directed---I offered to have the assign Gilroy to me and I would bring perfection in compliance or get another Field Operating Supervisor. These two men did nothing but when the fruits of Gilroy, who had a working staff of nearly thirty people lay crashed and crumpled at the time Bill Bellamy became the ELCO Area Manager on March 1, 1969, it was decided to blame both Frank and the Plaintiff.

Clearly there is a plethora of dishonest and/or illogical PRETEXTUAL reasons being worked up by Ken Johnson, Jay Tilkens, and the ELCO's new Area Manager Bill Bellamy and proof of pretext exists in the dozen of questions that were not asked in the several dozen witness affidavits submitted by Bill Bellamy and the EEO Investigators.

Final proof of the dishonesty of Ken Johnson as reported by the Bellamy letter is that Johnson claims he told me on several occasions to hire payroll staff and I told him 'I would not hire any clerks...would handle the payroll/personnel workload your (my way.' This clearly never happened. Ken Johnson was the only person in the ELCO that would know when anyone was to be hired and if funds were available. I never refused such an order and had I done as Bellamy says Ken said I did then I should have been terminated on the spot. The AMA Teleconference Report Records show that Russ Frumm the Personnel Manager for the Denver Region was unsure, as late as February 24, 1999, when funds would be available to hire the clerks and was still uncertain of the date that the clerks need to be hired for necessary training for the yet

unstated date in April when the ELCO would take over all of the field payroll and personnel functions. EXHIBIT TWO---AMA CONFERENCE CALL, Feb. 24, 1999, Page two, .Payroll Schedule Based on three situations: 1. 12 April 1999 when ELCOs will start keying. 2. Funding/Authorization for clerks received d; and clerks are in place for training.... NOTE. Clearly if the RCC wasn't sure about funding authorization then how did Ken Johnson order me to hire clerks on February 3, 15, and 18th as alleged in Exhibit One the Bellamy letter. Note that Mr. Jay Tilkens in his March 5th report claims I had no payroll clerks. I did in fact have two clerks.

On page three EXHIBIT TWO is a training schedule clearly indicating that Plaintiff is to be trained in Payroll Audit, Batch, and Key between the 17-26th of March. Tilkens faults me for not knowing these things before my training and then Mr. Bellamy uses this pretextual reason and the others concerning the clerks, inventory, et.al. Very clearly a trier of fact might consider this as evidence they were covering up the retaliatory termination of the Plaintiff on March 12, 1999.

Reeves v. Sanderson Plumbing Products, Inc. 120 S.Ct.2097. At page 2112 Justice Ginsburg concurring. .The Court today holds that an employment discrimination plaintiff may survive judgment as a mater of law by submitting two categories of evidence: first, evidence establishing a .prima facie case,: as that term is used in McDonald Douglas Corp. V. Green, 93 S.Ct. 1817 (1973);and second, evidence from which a rational fact finder could conclude that the employer's proffered explanation for its actions was false....it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability...it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above....

A final pretextual or false area mentioned by Bill Bellamy is that of the Supply Inventory. Mr. Johnson, according to the Bellamy letter in paragraph two, ordered me to establish a stock room inventory system on January 21, 1999, and that this was never

established.

Counsel for Defendant joins in this deceit in Material Fact Number 10 in Defendant's Motion. Counsel Ruth Cohen states that .Plaintiff admits that his 'inventory control system. consisted of a chart on the door of the storage room that employees could annotate when they took supplies.. Counsel Cohen gives as proof page 122, lines 9-14 of a deposition taken from Plaintiff Hawkins:

Counsel Cohen quotes .Q. But there was some kind of chart on the door that you would check off when somebody walked off. A. Yes, if you took some paper or if you wanted a test in Spanish or whatever, we had it in there---.

Is it dishonesty or just that Counsel was much less than thorough when she ignores lines 15-25 on page 122 and lines 1-4 on page 123 wherein the Plaintiff explains the inventory system more fully. Denver had inventories and would fact us inventories that they believed we should have and I would always check the supply room quickly against those inventories. Plaintiff was very conscious of the inventories of supplies and worked closely with the two supply clerks in the Regional Office who were the only people in the Regional Office who understood exactly what was available and on hand in Denver. It should be remembered here that as the operation was expanding Manager Johnson concluded somehow that all of the Reno Office inventory should be first sent to Las Vegas and then I would incur additional costs to ship it to Reno. I discussed this with the Regional Office Clerks who said this was stupid. I was discriminated against about that time and the Reno Manager, whom the Plaintiff had asked to be joined to this suit, was later moved don by the Regional Manager and her area manager Bill Bellamy.

Counsel for the Defendant has ignored my earlier discovery renderings to her concerning the Tilkens report. She was furnished a two page reply in my Initial Disclosure. Additionally the Tilkens report was discussed in my Second Set of Interrogatories furnished to the Defendant. Clearly the Ginsberg reasoning should allow the Court to rule for the Plaintiff.

APPENDIX 1 Dist.Court (Reno) ORDER

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ENTERED &SERVED
JULY 12 2002

Richard Hobbs,
Plaintiff

CV-n-01-0607-HDM(VPC)
ORDER

vs.

Donald L. Evans, et al...
Defendants

Plaintiff Richard Hobbs worked for the United States Census Bureau in 1998 and 1999 as the Field Operations Supervisor (FOS) in the Reno, Nevada office. This temporary position required Hobbs to work in Las Vegas as well. Both the Reno and Las Vegas offices display the government Equal Employment Opportunity (EEO) regulations and procedures for filing a discrimination complaint. Hobbs completed his FOS duties in April 1999. Hobbs later applied for other positions within the Census Bureau. As a veteran, Hobbs qualifies for preferred hiring within the government. He claims that the Regional Director of the Bureau unlawfully discriminated against him by preventing him from obtaining further employment. With the Census Bureau in retaliation for questions Hobbs had asked regarding Bureau hiring practices.

Hobbs asserts that the discriminatory acts constituting the basis for his complaint occurred in May 1999 and again in November 1999. Hobbs formally filed a complaint with the Equal Employment Opportunity Commission (EEOC) on February 24, 2000. Without reaching the merits, the EEOC denied Hobbs' claim on May 12, 2000 on the grounds that he failed to file his complaint within the statutory forty-five day limit from the date of injury. Hobbs appealed that decision. On September 22, 2000, the EEOC affirmed its decision denying Hobbs relief on the grounds that he failed to timely file. The EEOC appeal denial letter informed Hobbs of his right to file a claim in federal court within forty-five days of his

receipt of the final EEOC decisions.

Hobbs did not file this action until October 29, 2001, when he alleged discrimination and retaliation in employment. Defendant has moved for summary judgment arguing that Hobbs failed to meet the filing deadline.

A federal employee is required to raise a discrimination claim with an EEO counselor within forty-five days of an adverse employment action. 29 C.F.R. Sect. 1614-105(a) (1). The EEOC may dismiss a case that is not filed within the forty-five day limit. 29 C.F.R. Sect. 1614.107 (a) (2). Here, the EEOC made distinct findings, both on Hobbs' complaint and again on Hobbs' appeal, that he failed to timely file. This .(forty-five) day time limit is treated as a statute of limitations for filing suit and is subject to waiver, equitable tolling, and estoppel.. Miles v. Dep't of the Army, 881 F.2d 777, 780, (9th Cir. 1999). Defendant offered unrefuted evidence that Hobbs had constructive notice in both the Reno and Las Vegas offices of the proper procedure for filing a claim of employment discrimination. Failure to bring a grievance within the time determined by statute can be fatal to a federal employee's discrimination claim. Johnson v. United States Treasury Dep't, 27 F.3d 415 (9th Cir. 1994).

Hobbs failed to contact an EEO counselor within forty-five days of the alleged discriminatory act and the failed to commence this action within ninety days of his receipt of the decision by the EEOC affirming the dismissal of Hobbs' complaint as untimely. Therefore the court concludes that this action is time barred. 1

Defendant brought a motion to strike Hobbs' sur-reply to

---

1 Hobbs contends that he should be excused from failing to timely file this action because Max Hawkins, another census employee with employment discrimination litigation pending against the United States Secretary of Commerce, moved to amend his compliant to include Hobbs as a plaintiff on December 18, 2000. Max Hawkins v. Secretary of Commerce, CV-S-00-0585-KJD (Nevada). Hobbs did not file a declaration in support of request for joinder until February 26, 2001, when Hawkins filed a motion to strike Defendant's reply in that action. That motion and Hobbs'

declaration were filed several months after the expiration of the ninety day limitation period. Ultimately, the motion for joinder was denied by order dated August 31, 2001. Filing of a motion by another litigant is an insufficient basis to conclude Hobbs should receive equitable relief for his untimely filing in this action.

Defendant's Motion for Summary Judgment (#19). A sur-reply is not allowed absent an improper introduction of new arguments by the moving party in its reply to an opposition. Fed.R.Civ.P. 12, L.R. 7-2. Defendant did not raise new arguments in its reply, and therefore Hobbs' sur-reply shall be stricken.

Hobbs moved for sanctions to be imposed against Defendant, arguing that Defendant acted maliciously in moving to strike Hobbs' sur-reply (#20). As noted above, Defendant properly moved to strike the impermissible sur-reply. Therefore, Hobbs' motion for sanction is denied.

Defendants' Motion for Summary Judgment (#11) is GRANTED.

Hobbs Sur-reply (#18) is STRICKEN.

Hobbs' Motion for Sanctions (#20) is DENIED.

It is so ORDERED.

DATED THIS 11TH DAY OF July, 2002.

S/HOWARD B. MCKIBBON
U.S.DISTRICT JUDGE

APPENDIX J

The Plaintiff's motion for reconsideration was denied on September 11, 2002, and FILED Sept. 11, 2002.

Hobbs appealed the District Court's Order denying Reconsideration and the U.S.Circuit Court of Appeals heard the cause on a transcript of the Record from the U.S.District Court for the District of Nevada (Reno) and Ordered the Judgment of the said District Court Affirmed.

Filed and Entered April 4, 2003.

Hobbs's Petition for a Rehearing was Denied without further comment by a Panel of the 9th Circuit--Skopil, Ferguson, and Boochever, Circuit Judges. Filed April 25, 2003.